Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LMSB:PHI:POSTF 149951-01
ATAckerman

date:

to: Margaret M. Crouse, Appeals Team Case Leader, LMSB Area 1

from: Associate Area Counsel (LMSB:HMT) Philadelphia

subject: [redacted] - **Validity and Captioning of Form 872 Consent to Extend the Time to Assess Tax**

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This memorandum responds to your request for assistance dated August 15, 2001. This memorandum should not be cited as precedent.

ISSUES

(1) Whether the attached Form 872, executed after [redacted] ("[redacted]") merged into [redacted] and ceased to exist, is valid when the form bears the name of [redacted] as taxpayer and the signature of the Assistant Treasurer of [redacted]?

(2) How should the taxpayer be identified in subsequent Forms 872, and who should sign these consent forms?

CONCLUSION

(1) The Form 872 is valid under the equitable principle of contract reformation.

(2) The taxpayer should be identified as "[redacted] **[EIN] (formerly** [redacted]**), as successor in interest to** [redacted] **[EIN]**" with an asterisk next to it. Additionally, at the bottom of the first page of the attached Form 872, keep the following language next to the asterisk: "[redacted] **merged with and into** [redacted] **on** [redacted]**, and** [redacted] **changed its name to**

[redacted] **on** [redacted]." The signatory must be the surviving (or successor) entity through an officer with authority to do so - it can still be "[redacted]." On the corporate name line above [redacted]'s signature, "[redacted]" should be named (not [redacted]), and if [redacted] signs the form, her title of **"Assistant Treasurer"** should remain (as on the attached Form 872).

FACTS

On [redacted], [redacted] ("[redacted]") purchased all of the stock of [redacted] creating a short taxable year for [redacted] from [redacted] to [redacted].

On [redacted], [redacted] was merged into [redacted], and [redacted] ceased to exist. The next day, on [redacted], [redacted] changed its name to [redacted].

The Internal Revenue Service ("Service") has been conducting an examination of [redacted] for several years. A number of Forms 872 have been executed. Since the beginning of the examination of the income tax returns of [redacted], all Forms 872 have been captioned and signed, as reflected on the attached Form 872. (See attached Form 872.)

On the front of the Form 872, the captioning reflects "[redacted]" as the taxpayer on the ***Name*** line (with an accompanying asterisk) and **"c/o** [redacted]" on the ***Address*** line.

On the front of the Form 872, below the form text, there is the following statement (next to the asterisk) - "[redacted] **merged with and into** [redacted] **on** [redacted], **and** [redacted] **changed its name to** [redacted] **on** [redacted]."

On the signature section found on the back of the Form 872, next to the ***Corporate Name*** line and ***Corporate Officer*** signature line, "[redacted]" and "[redacted], **Assistant Treasurer"** are identified, respectively.

On the [redacted] date she signed the Form 872, [redacted] was Assistant Treasurer of [redacted]. Prior to [redacted]'s [redacted] name change, [redacted] worked in the tax department of what was then known as [redacted]. [redacted] did not previously work at [redacted].

On [redacted], the Service signed and executed the Form 872, purporting to extend the periods ended [redacted], [redacted], and [redacted] until [redacted].

ANALYSIS

(1) The Attached Form 872 Consent is Valid to Extend the Statute of Limitations to [redacted].

The Form 872 signed and executed by [redacted] on [redacted] and by the Service on [redacted] is valid.

Under Internal Revenue Code ("I.R.C.") § 6501(a), the period of limitations for assessing an income tax liability expires three years after the date the return was filed. Without an exception to I.R.C. § 6501(a), the period of limitations would have expired for the tax returns for years ended [redacted], [redacted], and [redacted]. The pertinent exception in this case can be found at I.R.C. § 6501(c)(4) Extension by agreement, which provides:

> (A) In general. Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, ... both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon....

I.R.C. § 6501(c)(4). The Form 872 serves as the "consent in writing" referred to in this Code section.

Neither I.R.C. § 6501(c)(4) nor the regulations promulgated thereunder specifies who may sign consents executed under that section. Accordingly, the Service applies the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. In the case of corporate returns, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act.

[redacted] was an appropriate official to sign the Form 872 Consent on [redacted], since she was Assistant Treasurer of [redacted], the successor corporation to [redacted]. As Assistant Treasurer of [redacted], [redacted] was authorized to sign returns, claims, consents, and other tax documents for [redacted]. And, as the successor corporation to [redacted]'s merger, [redacted] is primarily liable for [redacted]'s tax liability and has the power to extend the period of limitations for its own direct liability, just as its predecessor, [redacted], would have had. Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839, 853 (1985).

[redacted], a corporation for which [redacted] never worked and a corporation no longer in existence, was listed in error beside ***Corporate Name*** (and above [redacted]'s signature). As Assistant Treasurer of the successor corporation, [redacted] would have known that [redacted] merged out of existence nearly [redacted] years prior to her signing the Form 872. Based on the statement next to the asterisk at the bottom of the Form 872, the Service would also have known the history of the name change and merger. Because both parties to the Form 872 would have known the true facts, the error was a mutual mistake.

The Consent form simply does not represent the agreement of the parties due to a mistake in execution. Equitable reformation would serve to overcome the mutual mistake and validate the Form 872. See Woods v. Commissioner, 92 T.C. 776, 789 (1989)(Applying equitable principles, the Form 872-A may be reformed to conform with the parties' actual agreement.).

Despite the mutual mistake or error on the Form 872 at issue, the Consent form will be considered valid on the equitable reformation theory. Reformation is an equitable remedy used to reform written contracts to reflect the real agreement between the parties when, because of mutual mistake, the writing does not embody the contract as actually made. BLACK'S LAW DICTIONARY 1285 (7th ed. 1999). See Rocanville Corp. v. Natural Gas Pipeline Co., 823 F.2d 92, 94 (5th Cir. 1987) (When there was a mutual mistake concerning a contract term, the court reformed the contract.). Moreover, according to the Restatement of Law on Contracts:

> Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing,...reform the writing to express the agreement....

Restatement (Second) of Contracts § 155 (1981). Although a Form 872 is not a contract, contract principles are relevant because I.R.C. § 6501(c)(4) requires that the parties reach a written agreement concerning any extension. Consequently, reformation is appropriate in the Form 872 context.

One of the landmark cases on equitable contract reformation is Woods. According to Woods, the Tax Court has the equitable power to reform a consent to conform to the parties' intentions. 92 T.C. at 789. In Woods, the consents contained mistakes in the taxpayer's name and EIN. The name provided on the form was "Solar Environments Inc." rather than "Solar Equipment Inc." and the EIN was shown as "43-1156200" rather than "43-1156196." Woods v. Commissioner, 92 T.C. at 777. The Tax Court permitted the document to be reformed because the incorrect language was the product of a mutual mistake. The Tax Court noted that reformation is not precluded merely because the mistake originated with the IRS. The Tax Court stated that in order to reform a Form 872 there must be "clear and convincing evidence" as to the parties' consent. Woods v. Commissioner, 92 T.C. at 789.

In the present case, the IRS and persons authorized to execute Forms 872 on behalf of the taxpayer (e.g., Assistant Treasurer of successor in interest) intended to extend the period for assessment of tax for the tax years ended [redacted], [redacted], and [redacted]. Thus, there was a meeting of the minds and written agreements were entered into. However, the Forms 872 did not reflect what was actually intended by the parties. The Form 872 should have identified the ***Taxpayer*** as "[redacted] **[EIN] (formerly** [redacted]**), as successor in interest to** [redacted] **[EIN]**." See Rev. Rul. 59-399, 1959-2 C.B. 488 (holding that the surviving or resulting corporation in a merger or consolidation under state law may validly sign an extension on behalf of the predecessor corporation for a period before the transfer). We believe that, as the Tax Court did in Woods, 92 T.C. at 789, a reviewing court would likely reform the writing to conform to the parties' intentions.

Reformation would require that the Service show by "clear and convincing evidence" that the parties intended to name [redacted] as the ***Taxpayer*** name. Intent is demonstrated on two places on the front of the Form 872. First, next to [redacted] is an asterisk referring to a statement on the bottom of the form. Below the text on the bottom of the form, there is the statement - "[redacted] **merged with and into** [redacted] **on** [redacted], **and** [redacted] **changed its name to** [redacted] **on** [redacted]." Second, such intent is demonstrated by the fact that, on the ***Address*** line beneath [redacted], **"c/o** [redacted] ..." and [redacted]

[redacted]'s address are shown.

Reformation would also require that the Service show by "clear and convincing evidence" that, on the back of the Form 872 next to the ***Corporate Name*** line, the parties meant to name "[redacted]" not "[redacted]". Such intent can be inferred by looking under the ***Corporate Name*** line to the signature line, where "[redacted], **Assistant Treasurer**" is identified. On the [redacted] date she signed the Form 872, [redacted] was Assistant Treasurer of [redacted], not [redacted]. Prior to [redacted]'s [redacted] name change, [redacted] worked in the tax department of what was then known as [redacted]; she did not previously work at [redacted]. Obviously, she meant to write "[redacted]", her employer. That the Service overlooked such a mistake is not fatal. The form can be reformed.

As an alternative theory to mutual mistake, one might simply identify the error on the Form 872 as a clerical error, typographical err, or scrivener's error, of the type involved in Woods. 92 T.C. 776. In FARNSWORTH ON CONTRACTS § 7.5 (2d ed. 2000), the scrivener's error is broadly defined:

> The classic case for reformation is a scrivener's or word processor's error. Reformation is available in the case of the omission of a term agreed on, the inclusion of a term not agreed on, or the incorrect reduction of a term to writing. However, reformation is not limited to these situations. If the mistake of the parties relates to the legal effect of the language that they have used, the writing may be reformed so that it will have the intended effect. Reformation is available even if the effect of the error is to make it appear that the parties never reached an enforceable agreement.

FARNSWORTH ON CONTRACTS § 7.5 (2d ed. 2000). It would be reasonable to assume that a court could find that the errors at issue would be included in the above definition. In order to have the intended effect of the writing, reformation is necessary and appropriate.

Based on the above analysis, the attached Form 872 is deemed to have been executed in the name of [redacted] as successor in interest to [redacted]. And, as [redacted] is authorized to sign the Form 872, the Form 872 is valid.

(2) The Proper Language to Use on Form 872.

We recommend that additional Forms 872 should be captioned as follows:

- The ***Taxpayer*** name should be identified as: "[redacted] **[EIN] (formerly** [redacted]**, as successor in interest to** [redacted] **[EIN]**." Place an asterisk next to the name.

- At the bottom of the first page of the attached Form 872, keep the asterisk and the accompanying language: "[redacted] **merged with and into** [redacted] **on** [redacted]**, and** [redacted] **changed its name to** [redacted] **on** [redacted]**.**"

- On the signature portion of the Form 872, the signatory must be the surviving (or successor) entity through an officer with authority to do so - it can still be "[redacted]." However, on the ***Corporate Name*** line above [redacted]'s signature, "[redacted]" should be named (not [redacted]), and if [redacted] signs the form, her title of "**Assistant Treasurer**" should remain (as on the attached Form 872).

This concludes our advice and recommendation in this matter. We are forwarding a copy of this advice to Senior Litigation Counsel (HQ) (CC:LMSB:HMT:SLC) and to our National Office for mandatory ten day post review. We will promptly advise if we receive contrary advice from our National Office.

Please feel free to call Attorney Trevor Ackerman at 215-597-3442, if you have any additional questions.

By:__________________________

JAMES C. FEE, JR.
Associate Area Counsel
(Large and Mid-Size Business)